In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. 36.

CARL C. INMAN,

Petitioner,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF ON THE MERITS.

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OPINION BELOW.

The judgment of the Common Pleas Court may be found (R. 240). The opinion of the Court of Appeals of Summit County, Ohio (R. 248), is unreported. The decision of the Supreme Court of Ohio dismissing petitioner's appeal "filed as of right herein" (R. 264) is reported in 168 O. S. 335. The decision of the Supreme Court of Ohio overruling the motion of petitioner for an order directing the Court of Appeals of Summit County, Ohio, to certify its record (R. 266) appears in 31 Ohio Bar No. 44. The decision of the Supreme Court of Ohio denying the application for rehearing (R. 267) appears in 31 Ohio Bar, No. 47.

JURISDICTION.

The jurisdiction of this Court is found in 62 Stat. 928, 28 U. S. Code, Sec. 1257(3).

STATUTES INVOLVED.

The Federal Employers' Liability Act, 35 Stat. 65; 45 U. S. C. A. 51.

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

State Courts; Appeal; Certiorari. 62 Stat. 929; 28 U. S. Code 1257.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

3. By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground if its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

QUESTIONS PRESENTED.

1. Did the Court of Appeals of the State of Ohio err in holding as a matter of law that the evidence adduced does not show any negligence of respondent, and does not permit the inference, or authorize the jury to infer, that the respondent was negligent as charged and submitted?

2. In an action under the Federal Employer's Liability Act, 45 U. S. C. 51 *et seq.*, where the employer sent an employee as a crossing watchman, in the night season, to stand directly in the intersection of two heavily travelled highways, immediately west of its railroad tracks, and the highways intersected at both sides of the railroad tracks, which crossed both highways diagonally between both intersections, and the employee's duties required him to face the train, with his back to traffic, as the train was passing over the crossing, thus creating a likelihood that the employee might be struck by a vehicle of a third party, which in fact occurred, can the state court say as a matter of law that there was no actionable negligence?

3. In an action under the Federal Employer's Liability Act, can it be said that where the employee is struck by an automobile driven by a third party, that defendant must be exculpated, as a matter of law, because the automobile driver violated traffic statutes or ordinances?

4. Has the State Court of Appeals properly read into the Federal Employer's Liability Act, a requirement that where the injuries resulted "in part" from the employer's negligence, in addition thereto such negligence must be a proximate cause of the injury, in the common law legal sense before liability attaches?

STATEMENT OF THE CASE.

Under the pleadings (R. 1-8) it was admitted that the petitioner's duties as an employee of the respondent were in furtherance of the interstate commerce transportation business of the respondent and that, by reason thereof, the petitioner and the respondent were at all times herein mentioned engaged in interstate commerce and were subject to the Federal Employer's Liability Act.

Tallmadge Avenue (State Route 18) a main traffic artery extends east and west in the City of Akron, Ohio (R. 213), and is intersected on an angle by Home Avenue, which extends in a northeasterly and southwesterly direction (R. 215). Respondent operates a 3 track line diagonally across the intersection of both highways (R. 212). Home Avenue intersects Tallmadge Avenue on both sides of the railroad tracks (R. 214-215) so that vehicles approaching from the southwest on Home Avenue had the right to and did often turn left into Tallmadge Avenue where the two highways converge along the most westerly track of the railroad (R. 214), (R. 227), (R. 236).

A little after midnight on January 2, 1952 a freight train of the respondent travelling in a northwesterly direction was approaching the crossing, and in the performance of his duties as a crossing flagman, petitioner stationed himself directly in the intersection of Tallmadge and Home Avenues a few feet west of the tracks, as he was instructed (R. 16).

Petitioner was the only flagman on duty at the crossing at that time (R. 125), and he had a number of duties to perform. He had to flag traffic moving in all four directions to a stop (R. 16). While the train was passing over the crossing there was another train due out of Ravenna, Ohio, which was travelling in a westerly direction which

was known as the Detroit steel train, and Petitioner had to face the train and look to the north to see if the other train was approaching before clearing the crossing to let traffic through the intersection (R. 17-18) (R. 126). He also had to look for hot boxes on the train which was passing over the crossing and he was required to signal the conductor if he discovered any hot boxes (R. 114). While standing in this position he necessarily had to have his back to traffic on both highways west of the tracks and he was unable to see traffic on Home and Tallmadge Avenues west of the tracks (R. 18). Just as the caboose reached the crossing, an automobile on Home Avenue "jumped the gun" and without any signal or warning started up and made a left hand turn onto Tallmadge Avenue (R. 68) and struck petitioner before he had a chance to face traffic (R. 18).

The Court submitted the case to the jury on well established principles of railroad law and the jury returned a verdict in favor of the petitioner and assessed his damages in the sum of $25,000.00 (R. 240). Before it could return the verdict, the jury was required to find that the respondent was negligent in failing to use ordinary care to provide the petitioner with a reasonable safe place to work under the circumstances aforesaid (R. 202).

In addition thereto, the jury answered two interrogatories submitted to them at the respondent's request, which are as follows:

> No. 1. Do you find that the defendant was negligent?
>
> Answer: "In Part."
>
> No. 2. If your answer to question No. 1 is in the affirmative, state of what said negligence consisted.
>
> Answer: "Not providing enough protection." (R. 239.)

The trial court accepted the verdict of the jury and entered judgment thereon. Upon appeal, the Court of Appeals for Summit County, Ohio, reversed the judgment and rendered final judgment for respondent. The Supreme Court of Ohio refused petitioner's motion to Certify the Record and denied rehearing.

ARGUMENT.

I. Did the Court of Appeals of the State of Ohio err in holding as a matter of law that the evidence adduced does not show any negligence of respondent, and does not permit the inference, or authorize the jury to infer, that the respondent was negligent as charged and submitted?

Inasmuch as this matter is before this Court because of petitioner's claim that the opinion of the Court of Appeals for Summit County, Ohio, is erroneous, we deem it our duty to point out the errors into which the State Court fell.

The State Court of Appeals overlooked certain material facts established by the evidence in proceeding on the theory "there is further no evidence of prior occurrences of the kind here under consideration, which would put the defendant on notice of likelihood of injuries to one in the position of plaintiff" (R. 255).

Sam Bailey, a witness to the accident, was well aware of the disregard for signals on the part of vehicular drivers and of their habit of "jumping the gun" at this intersection. He testified (R. 68):

> "A. I had stopped for the train and the train was just about to clear the crossing, I believe the cab was coming over the crossing at the time. *This car, like a lot of them I seen there, jumping the gun*, seen the tail end of the train coming up went around the cars, this car came around several cars that was on Home Ave-

nue and turned west on Tallmadge Avenue and hit the watchman."

The defendant could foresee the possibility that a driver of a motor vehicle would disregard the crossing signals, "jump the gun" and make a left hand turn from Home Avenue to Tallmadge Avenue. Other drivers had previously done so.

The overlooking of the material facts above mentioned leads to a nullification of the effect of the controlling line of Supreme Court decisions.

Both Home and Tallmadge Avenues were heavily travelled both in daytime and at night (R. 103). It was the duty of the petitioner, while the eastbound train was passing over the crossing, to look for other trains approaching the crossing (R. 126). Between two hundred and two hundred and fifty feet north of Tallmadge Avenue the tracks curve to the right and then to the left (R. 20). The Detroit steel train which had left Ravenna, Ohio, about fifteen minutes before petitioner went out to flag the eastbound train was due over the crossing and petitioner had been looking for that train to approach (R. 17).

Raymond B. Peterson, the conductor on the train and a witness for the defendant, was well aware that petitioner's duties required him to face the train with his back to traffic, while the train was passing the intersection. He testified (R. 114):

> "Q. You say it was the watchman's duty to keep watching your train as it went by to see if there were any hot boxes or anything wrong with your train and if there was he'd give you a signal? That's customary? A. That's customary, other duties permitting he is generally required to do that.
>
> Q. He had watched trains you had been on? A. Yes, sir.
>
> Q. And if he saw something wrong he'd give you a signal? A. That's right."

Petitioner testified (R. 16):

"Q. Any reason you went west of the westbound tracks? A. That was instructions, an eastbound train, a train going east the flagman should be on the west side of it so he can see if there's anything coming on the westbound.

Q. Who gave you those instructions? A. For one, Mr. Gamble, when he was instructing me about flagging up there because I had never done any flagging on the railroad.

Q. What was Mr. Gamble's capacity with the railroad? A. Crossing watchman.

Q. And what did you do when you got to the center of Tallmadge Avenue? A. By the time I got there the train was almost close enough—I had to look at traffic all four ways, if there was room I let two or three cars go through, if there wasn't I blew my whistle, turned my lantern so each one could see it, this shield on it, it's a fourteen inch shield. (R. 16.)

Q. Which way did you face then after the train started to pull across the crossing? A. After the crossing was blocked you have reference to? (R. 17.)

Q. Yes. A. I looked at the train. I looked away, that time, until I could see where the caboose was, then I had to look north towards Cuyahoga Falls to see if I could get a reflection, that was looking over my left shoulder. (R. 17.)

Q. What was your reason for looking toward Cuyahoga Falls? A. One to see if there was a reflection of a headlight coming around the curve. I couldn't see the light down at Evans Avenue. (R. 17.)

Q. Why couldn't you? A. The eastbound train was blocking it. (R. 17.)

Q. Now, while you were standing facing the way you were, were you able to see traffic back on Home Avenue at that time? A. No. (R. 18.)

Q. Were you able to see traffic that was west of you that was going east? A. No. (R. 18.)

Q. Now after you were looking north, or left, to

watch for this Detroit steel train what, if anything, did you do? A. In regard to what?

Q. As the caboose was approaching the intersection what did you do? A. I turned my head real quick to the right and—

Q. Looking toward where?

A. Evans Avenue, and saw I couldn't see that light.

Q. All right. And then what happened, tell the jury in your own words, what happened?

A. I turned my head to look towards Cuyahoga Falls, that would be north, and I was watching for a train to come around there before I'd clear the crossing to let traffic through, *and just as the caboose got up on the crossing I went to make just a step backwards and a turn, and that's when I got hit.* From then on I didn't remember anything.

Q. Had you signalled traffic forward? A. No sir." (R. 19.)

In the instant case the jury was justified in finding that the method of performing his work required a division of petitioner's attention; that he was thrust into an unsafe place to work, in the night season, in the intersection of two of the heaviest travelled and most dangerous traffic arteries in the State of Ohio, where a lot of other cars had "jumped the gun" and where petitioner, while performing his work was struck before he could face traffic. Petitioner was no Janus bearing two faces and able to look in both directions at the same time.

The automobile which struck petitioner had been stopped on Home Avenue (R. 84) about 60 to 70 feet away from the point where petitioner was standing at the time he was struck (R. 37). Vehicles traveling on Home Avenue had the right to, and often did turn left into Tallmadge Avenue where both highways converge west of the defendant's trucks. The jury could reasonably infer that had

petitioner, in the performance of his duties been permitted to face vehicular traffic, he might well have jumped, dived, moved or done anything else in order to save himself from being struck; *that because the petitioner's multiple duties divided his attention the importance of the automobile driver's conduct was enlarged.*

To use the language of Mr. Justice Brennan in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 503:

> "These were probative facts from which the jury could find that respondent was or should have been aware of conditions which created a likelihood that petitioner, in performing the duties required of him, would suffer just such an injury as he did."

Paraphrasing the language of Mr. Justice Douglas in the case of *Lindsley v. Central Vermont R. Co.*, 319 U. S. 350,

> "* * * These were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing the petitioner with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue * * * as well as issues involving controverted evidence * * *. To withdraw such a question from the jury is to usurp its functions."

Clearly the state court in the instant case, in reaching its conclusion that the evidence failed to show negligence on the part of respondent improperly reweighed the evidence and came to an independent conclusion thereon in conflict with the findings of a fully and properly instructed jury. *Tennant v. Peoria & P. U. R. Co.*, 321 U. S. 29. *Wilkerson v. McCarthy*, 336 U. S. 53.

2. In an action under the Federal Employer's Liability Act, 45 U. S. C. 51 et seq., where the employer sent an employee as a crossing watchman, in the night season, to stand directly in the intersection of two heavily traveled highways, immediately west of its railroad tracks, which crossed both highways diagonally at the intersection, and the employee's duties required him to face the train, with his back to traffic as the train was passing over the crossing, thus creating a likelihood that the employee might be struck by a vehicle of a third party, which in fact occurred, can the state court say as a matter of law that there was no actionable negligence?

The Issue of Negligence Was for the Jury.

The jury had before it sufficient probative facts to sustain its verdict for petitioner. The State Court of Appeals deprived him of his constitutional right to a trial by jury when it reversed the trial court judgment and the verdict of the jury and directed entry of final judgment for the railroad.

The standard to be applied in reviewing the sufficiency of the evidence in cases arising under the Federal Employers has been enunciated in the recent decision in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, where the court said, at pages 506, 507:

> "Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to a single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death."

The case of *Schulz, Administrator v. Pennsylvania R. Co.*, 350 U. S. 523, 525, 526, decided by this Court on April 9, 1956, states:

"In considering the scope of issues entrusted to juries in cases like this, it must be borne in mind that negligence cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre. Surveyors can measure an acre, but measuring negligence is different. The definitions of negligence are not definitions at all, strictly speaking. Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done under like circumstances. Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. 'We think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others'. *Jones v. East Tennessee, V. & G. R. Co.*, 128 U. S. 443, 445 (1888)."

Near its conclusion the opinion holds:

"Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn."

The following decisions have consistently given recognition to the pronouncement enunciated in the *Rogers* case. See also *Webb v. Illinois Central R. Co.*, 352 U. S. 512. *Shaw v. Atlantic Coast Line R. Co.*, 353 U. S. 920; *Futrelle v. Atlantic Coast Line R. Co.*, 315 U. S. 920; *Deen v. Gulf, C. & S. F. R. Co.*, 353 U. S. 925; *Thomson v. Texas & Pacific R. Co.*, 353 U. S. 926; *Arnold v. Panhandle & S. F. R. Co.*, 353 U. S. 360; *Ringhiser v. Chesapeake & O. R. Co.*, 354 U. S. 901; *Moore v. Terminal R. Assn. of St. Louis*, 79 S. Ct. 2.

3. In an action under the Federal Employer's Liability Act, can it be said that where the employee is struck by an automobile driven by a third party, that defendant must be exculpated, as a matter of law, because the automobile driver violated traffic statutes or ordinances?

The opinion of the State Court of Appeals frankly holds that the respondent had the right to rely on traffic rules and regulations relating to the conduct of a third party or stranger; that the respondent in the performance of its duty to its own employee was not required to anticipate negligence on the part of such third person in nonobservance of these rules. This is, in fact, the basis of the decision.

The automobile driver's negligence no more relieved this defendant from its obligation than did the criminal act of a third party relieve the defendant in *Cahill v. New York, New Haven & Hartford R. Co.*, 350 U. S. 898 (1956) reversing 224 F. (2d) 637; *Smalls v. Atlantic Coast Line R. Co.*, 348 U. S. 946 (1955), reversing 216 F. (2d) 842. In *Lillie v. Thompson*, 332 U. S. 459 (1957), the Court said at page 462:

> "That the foreseeable danger was from intentional or criminal misconduct is irrelevant; respondent nonetheless had a duty to make reasonable provision against it. Breach of that duty would be negligence and we cannot say as a matter of law that petitioner's injury did not result at least in part from such negligence."

This Court in *Cahill v. The N. York, N. Haven & Hartford Railroad Co., supra*, 350 U. S. 898 (1956), in reversing the Second Circuit, 224 F. (2d) 637, impliedly sanctioned the views expressed in the minority opinion of the Circuit Court which were in part as follows:

"My colleagues' opinion seems to me to amount to saying that, as a matter of judicial notice, such a man could not have jumped to safety when a truck, which had been stationary, four feet away, started in motion. With that position I do not agree. A truck cannot leap forward from rest like a greyhound or a modern sport-model passenger automobile. I think that we cannot hold that a jury acted unreasonably in believing that an agile young man could not here have rescued himself, had he been looking directly at the truck when it began to move towards him.

Nor do I agree that the defendant must be exculpated because the truckdriver's conduct was criminally negligent or reckless. Since such drivers are part of the facts of life, as police records demonstrate, defendant owed plaintiff a duty to train him to take such behavior into account. Such an 'intervening' factor does not exculpate in such circumstances."

In the *Cahill* case, *supra*, the charge of negligence was that defendant failed to instruct the plaintiff, new at the particular job, not to turn his back on the motor traffic. In the instant case, because of his multiple duties, plaintiff necessarily had to have his back to motor traffic.

In the case of *Smalls v. Atlantic Coast Line R. R. Co.*, 348 U. S. 946, the Court reversed *per curiam* without opinion the decision of the Court below: The facts are taken from the opinion of the Court of Appeals, 216 F. 2d 842. The plaintiffs were standing at a railroad crossing waiting to be picked up by one of the railroad's trains for transportation to a safety meeting sponsored by the railroad. Attendance at the meeting was voluntary, but encouraged. While waiting for the train, plaintiffs were struck by an automobile driven by a person having no connection with the defendant railroad. The plaintiffs contended that the railroad had not provided them with a safe place to work in that the crossing was not lighted.

A judgment for plaintiffs on a jury verdict was reversed by the Court of Appeals, on the ground that there was no evidence that the defendant was negligent.

The decision of the State Court of Appeals is contrary to the holdings of the Supreme Court and is at variance with current legal opinion throughout the country.

In *Restatement of the Law* 2, Torts, Negligence, Section 449 it is said:

> "If the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby."

In the same connection, and upon the question of foreseeability, we find in *Shearman & Redfield on Negligence*, 6th Ed., Vol. 1, section 38 A, the following:

> "The familiar position that one is ordinarily under no obligation or duty to foresee or anticipate the negligence of another has no application. It is merely a question of fact for the jury."

See also *Restatement of Torts*, Section 290, a., and comment b; Section 302 b., and comments c., i., j.

There is scarcely a mile of highway in the whole country, that is not monumented with violation of traffic laws. Keeping the administration of law in reasonable nearness to the realities of life and social facts we cannot blind ourselves to actual conditions we know exist,—to the experience flooding in upon us every day through press, radio, and the medium of our own eyes. Neither can the respondent. In the exercise of ordinary care for the protection of its employee, the petitioner, it was the duty of the respondent to take into consideration those dangers which are within every day experience, from whatever source

they come, and make such provision against them as ordinary prudence requires.

This Court said in the case of *Ferguson v. Moore-McCormack Lines Inc.*, 352 U. S. 521 in its opinion:

> "It was not necessary that respondent be in a position to foresee the exact chain of circumstances which actually led to the accident."

4. The decision of the Court of Appeals in the instant case that the negligence of the defendant must be the "proximate cause" in the common law sense, in these Federal Employer's Liability Act cases, is in direct conflict with the latest decisions of the United States Supreme Court.

The opinion of the State Court of Appeals in deciding that "The basis for recovery by an injured employee under the Federal Employer's Liability Act is therefore negligence of the employer in failing to provide a safe place for the employee to work, which negligence proximately causes, in whole or in part, the injuries of which complaint is made," is to be interpreted as meaning that the negligence of the carrier, in addition to being responsible in part for the injury, must also be the "proximate cause" of such injury in the common law sense before liability attaches. For this proposition, it cited 29 *Ohio Jurisprudence*, Negligence Sec. 68 (R. 250-251).

The decision clearly contravened =51 of the Federal Employer's Liability Act which establishes liability for injury resulting, *in whole or in part*, from the negligence. That the negligence of a common carrier as an employer need not be the "proximate cause" in the common law sense but need only be the slightest cause, in order to establish liability under the Federal Employer's Liability

Act, is illustrated by the decision of this Court in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 506, where the court said:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played *any part, even* the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. * * * The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part*' to its negligence."

5. Implicit in the jury verdict is a finding that respondent could have anticipated or foreseen that petitioner, in performing the duties required of him, would suffer just such an injury as he did. In reversing, the State Court of Appeals refused to respect that finding and thereby deprived petitioner of his right to trial by jury given to him by the Federal Employer's Liability Act.

The trial judge did charge that one of the elements the jury should consider was whether respondent should have reasonably anticipated or foreseen the act or acts which caused petitioner's injury (R. 203-5). The State Court of Appeals refused to accept the jury's affirmative answer to that question and substituted its own finding for that of the jury, in holding that the occurrence was not within the realm of reasonable "foreseeability"; it thereby usurped the jury's function and deprived petitioner of the right to trial by jury given to him under F. E. L. A.

The jury was carefully instructed, that if petitioner's injury resulted solely from the negligence of James Ball,

the operator of the automobile which struck him, the verdict should be for respondent (R. 208).

The jury was properly instructed upon the issue of respondent's negligence and its effect if it had any part in producing petitioner's injury (R. 204).

The jury was further carefully instructed as to its verdict if it should find that petitioner's injury resulted from his own acts and conduct (R. 206).

The jury was further carefully instructed as to the effect of the combined and concurrent negligence of both respondent and the driver of the automobile which struck petitioner (R. 208).

CONCLUSION.

The judgment of the State Court of Appeals for Summit County, Ohio, should be reversed and the judgment of the trial court should be reinstated.

Respectfully submitted,

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